

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
November 07, 2013

Parent,<sup>1</sup> on behalf of,  
Student,\*

Petitioner,

Date Issued: November 6, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,  
Respondent.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND PROCEDURAL HISTORY**

The student is a \_\_\_\_\_ attending School A. The student's current individualized education program (IEP) lists specific learning disabled (SLD) as the student's primary disability classification and provides for the student to receive ten (10) hours per week of specialized instruction within the general education setting and fifteen (15) minutes per month of occupational therapy (OT) consultative services.

On August 23, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to evaluate the student in all areas of suspected disability and/or failing to conduct a comprehensive speech and language assessment and OT evaluation; and failing to develop an appropriate IEP for the student on or about March 21, 2012 and March 13, 2013 in that the IEPs failed to provide the student with sufficient instructional services in an outside general education setting in light of the student's lack of educational progress, failing to provide the student with direct OT services and speech-language services and failing to include appropriate motor skills designed to meeting the student's needs and enable him to make progress in the general education curriculum. As relief for this alleged denial of FAPE, Petitioner requested comprehensive speech-language and OT assessments/evaluations at fair market value and all other assessments/evaluations recommended in those assessments/evaluations; for DCPS to convene a multidisciplinary team (MDT) meeting

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<sup>1</sup> Personal identification information is provided in Appendix A.

\*The student is a minor.

within 10 days of the completed assessments to review the assessments, review the student's IEP accordingly, determine compensatory education and discuss and determine placement; for the student's IEP to be revised to include specialized instruction outside of the general education environment for reading, mathematics and written language; and compensatory education.

On September 4, 2013, Respondent filed an untimely Response to the Complaint. In its Response, Respondent asserted that: the parent participated in the student's March 21, 2012 IEP Team meeting and did not express any disagreement with the student's IEP at the time; the IEP developed for the student on March 21, 2012 was based on current evaluative data and reasonably calculated to provide the student educational benefit at the time it was developed; the result of an IEP is not a gauge for the appropriateness of the IEP; the occupational therapist continued occupational therapy on a consultative basis to ensure that the student was doing well before exiting the student from occupational therapy; the occupational therapist continued to monitor and evaluate the student's progress and use of his assistive technology device through the end of the 2011-2012 school year; the student was appropriately and adequately evaluated before being exited from direct occupational therapy services; the parent participated in the March 13, 2013 meeting and did not disagree with the IEP Team's decision regarding occupational therapy or any other IEP provision at the time; the student's March 13, 2013 IEP was appropriate for the student; and the student's IEP Team agreed to the student's programming and level of services and there was no concern in the area of speech-language.

On September 6, 2013, the parties participated in a Resolution Meeting and failed to reach an agreement during the meeting however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on September 23, 2013, following the conclusion of the 30-day resolution period, and ends on November 6, 2013. The Hearing Officer Determination (HOD) is due on November 6, 2013.

On September 19, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on September 21, 2013. The Prehearing Order clearly outlined the issue to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

On October 18, 2013, Petitioner filed Disclosures including twenty-three (23) exhibits and five (5) witnesses.<sup>2</sup> On October 18, 2013, Respondent filed Disclosures including thirty-nine (39) exhibits and five (5) witnesses.

The due process hearing commenced at approximately 8:59 a.m. on October 25, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-18 and 20-23 were admitted into the record without objection. Petitioner's Exhibit 19 was admitted, over Respondent's objection, because although the

document is not complete, the information contained with the document may be relevant. The Hearing Officer noted that the weight of the exhibit will be assessed based on the fact that the document is not complete. Respondent's Exhibits 1-39 were admitted into the record without objection.

### Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

### ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to comprehensively evaluate the student in March 2012, specifically by failing to conduct speech-language and occupational therapy assessments/evaluations of the student, and if so, whether this failure constitutes a denial of a FAPE?
2. Whether DCPS denied the student a FAPE by failing to develop appropriate IEPs for the student on March 21, 2012 and March 13, 2013, specifically by failing to include ten (10) hours per week of specialized instruction outside of the general education environment rather than ten (10) hours per week of specialized instruction within the general education environment, direct occupational therapy, goals to address the student's deficits in motor skills and speech-language services as recommended in a July 2011 private evaluation to address the student's weaknesses in receptive language and vocabulary?

### FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student was identified as a student with disabilities in 1<sup>st</sup> grade. (Petitioner's Exhibit 7; Respondent's Exhibit 16; Parent's Testimony)
3. The student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). (Petitioner's Exhibits 3 and 5; Respondent's Exhibit 2; Evaluator's Testimony)

4. The student is classified as a student with SLD and struggles with dysgraphia. (Petitioner's Exhibit 5; Respondent's Exhibit 2)
5. The student is outgoing, gregarious and meets new people easily. (Petitioner's Exhibit 5; Respondent's Exhibit 2)
6. The student is polite and friendly and has a pleasant sense of humor. (Petitioner's Exhibit 5; Respondent's Exhibit 2; Special Education Teacher's Testimony)
7. The student is competent at hands-on activities such as putting cars together, building elaborate structures with Legos and making electronic equipment. (Petitioner's Exhibit 5; Respondent's Exhibit 2)
8. The student has an average full-scale intelligence quotient (IQ). (Petitioner's Exhibit 5; Respondent's Exhibits 2 and 16)
9. The student has "superlative" strength in verbal comprehension. (Petitioner's Exhibit 5; Petitioner's Exhibit 3; Respondent's Exhibits 2 and 16; Evaluator's Testimony)
10. The student has "exceptional" ability to think and problem-solve with analytical tasks that emphasize language. (Petitioner's Exhibits 3 and 5; Respondent's Exhibits 2 and 16; Evaluator's Testimony)
11. The student has average abilities in visual tasks. (Petitioner's Exhibits 3 and 5; Respondent's Exhibits 2 and 16; Evaluator's Testimony)
12. The student has low average abilities in working memory and processing speed. (Petitioner's Exhibits 3 and 5; Respondent's Exhibits 2 and 16; Evaluator's Testimony)
13. The student has a tendency to rush and miss important visual details. (Petitioner's Exhibit 5; Respondent's Exhibit 2; Evaluator's Testimony)
14. The student has a weakness in the automaticity of retrieval of already-learned material. (Petitioner's Exhibit 5; Respondent's Exhibits 2 and 16; Evaluator's Testimony; Parent's Testimony)
15. The student has excellent comprehension and is able to comprehend at or above grade level when words or passages are read to him. (Petitioner's Exhibits 2, 3, 5; and 8 Respondent's Exhibits 2, 8, 13 and 16; Parent's Testimony)
16. The student struggles in decoding and word recognition. (Petitioner's Exhibits 5 and 8; Respondent's Exhibit 2; Evaluator's Testimony; Special Education Teacher's Testimony)
17. The student struggles with math calculation however functions in the average range in math reasoning. (Petitioner's Exhibits 3, 5 and 8; Respondent's Exhibit 2; Evaluator's Testimony)
18. The student has a large discrepancy between his verbal abilities and his written expression. (Petitioner's Exhibit 5; Respondent's Exhibit 2; Evaluator's Testimony)
19. The student is able to dictate his thoughts and produce a written product. (Petitioner's Exhibits 3, 8, 13 and 17; Respondent's Exhibit 13)
20. The student has weak spelling skills. (Petitioner's Exhibit 13; Respondent's Exhibits 1, 5, 13 and 16; Special Education Teacher's Testimony)
21. The student has functional deficits in motor and writing skills. (Petitioner's Exhibit 3)
22. The student has difficulty manipulating a pencil, has "scratchy" handwriting and weak fine-motor coordination. (Petitioner's Exhibit 5; Respondent's Exhibit 2)
23. The student has difficulty with motor planning and dexterity. (Petitioner's Exhibit 3)

24. The student uses assistive technology to take notes in class. (Petitioner's Exhibits 13 and 18; Respondent's Exhibits 8 and 9)
25. The student needs regular redirection and prompting to stay on task. (Petitioner's Exhibits 3 and 17; Parent's Testimony)
26. The student requires encouragement to begin written work. (Petitioner's Exhibit 18; Respondent's Exhibit 9; Special Education Teacher's Testimony)
27. The student is easily distracted and has a short attention span. (Petitioner's Exhibits 2, 3, 5 and 8; Respondent's Exhibit 2)
28. In November 2009, the student was reevaluated. (Petitioner's Exhibit 8; Respondent's Exhibits 19, 20 and 21)
29. In March 2011, the student mastered his OT goals. (Respondent's Exhibit 3)
30. During Summer 2011, the student attended a speech-language reading fluency program at School B. (Petitioner's Exhibit 6; Respondent's Exhibit 5; Speech-Language Pathologist's Testimony; Parent's Testimony)
31. The speech-language reading fluency program at School B is designed to help students with reading disabilities address underlying skills that make up the foundation of reading fluency. (Speech-Language Pathologist's Testimony; Parent's Testimony)
32. At the end of Summer 2011 the student was "ready to encounter" reading material through blending, phoneme segmentation and phoneme manipulation. (Petitioner's Exhibit 6; Respondent's Exhibit 5)
33. At the end of Summer 2011 the student was not "ready to encounter" reading material through code knowledge. (Petitioner's Exhibit 6; Respondent's Exhibit 5)
34. In November 2011, the student had not made progress toward his written expression IEP goal based on his difficulty with focusing. (Respondent's Exhibit 7)
35. By January 2012, the student was able to research, outline and draft a paper that contained grouped ideas presented in a logical order. (Petitioner's Exhibit 13; Respondent's Exhibit 8)
36. In February 2012, the OT had no concerns regarding the student's visual or motor functioning. (Petitioner's Exhibit 18; Respondent's Exhibit 9; Assistant Principal's Testimony)
37. In March 2012, the student needed individualized instruction in order to access new material in math. (Petitioner's Exhibit 3; Evaluator's Testimony)
38. In March 2012, the student was able to keep pace with his peers with the assistance of a calculator in math. (Petitioner's Exhibits 3 and 4)
39. On March 21, 2012, the student's IEP Team agreed to continue OT consultative services for the student. (Petitioner's Exhibits 3 and 4; Respondent's Exhibit 11; Parent's Testimony; Assistant Principal's Testimony)
40. The student's March 21, 2012 IEP prescribed ten hours per week of specialized instruction within the general education environment, 15 minutes per month of OT consultation services, assistive technology and accommodations and modifications. (Petitioner's Exhibit 3)
41. In March 2012, the student's IEP Team recommended a complete assistive technology assessment. (Petitioner's Exhibit 3)

42. In June 2012, the student's inattention and lack of focus hindered the student's mastery of his math IEP goals. (Petitioner's Exhibit 13; Respondent's Exhibit 14; Student's Testimony)
43. For the 2011-2012 school year, the student received the grade letter "C-" in math and science, the grade letter "C+" in English, the grade letter "B" in Reading Workshop and music, the grade letter "D" in history and the grade letter "B+" in physical education. (Petitioner's Exhibit 9)
44. For the 2011-2012 school year, the student scored in the Below Basic range in reading and composition, and in the Proficient range in math on the District of Columbia Comprehensive Assessment System (DC CAS). (Petitioner's Exhibit 15)
45. Although the student has poor handwriting, School A addressed this problem by providing the student with assistive technology. (Petitioner's Exhibits 2, 3, 7, 8, 13, 17 and 18; Respondent's Exhibits 7, 8, 9, 13, 14, 15, 16, 22 and 27; Assistant Principal's Testimony)
46. On September 17, 2012, DCPS conducted a data review of the student's academic and functional data. (Petitioner's Exhibit 7; Respondent's Exhibit 16; School Psychologist's Testimony)
47. On September 19, 2012, the student's IEP Team met to reevaluate the student. (Petitioner's Exhibit 8; Respondent's Exhibits 17, 19, 20 and 21; School Psychologist's Testimony)
48. On September 19, 2012, the student's IEP Team determined that no additional assessments were needed to determine the student's eligibility. (Petitioner's Exhibit 8; Respondent's Exhibits 17, 19, 20 and 21; School Psychologist's Testimony)
49. On September 19, 2012, there were no concerns regarding the student's speech-language functioning. (Petitioner's Exhibit 8; Respondent's Exhibits 17, 19, 20 and 21; School Psychologist's Testimony; Assistant Principal's Testimony)
50. In March 2013, the student lacked initiative in English, Reading Workshop, math and physical education. (Petitioner's Exhibits 10 and 17; Parent's Testimony; Special Education Teacher's Testimony; Student's Testimony)
51. In March 2013, the student was earning the grade letter "F" in English, science, history and math; the grade letter "B-" in Reading Workshop; the grade letter "D+" in physical education; and the grade letter "B+" in art. (Petitioner's Exhibit 10)
52. On March 13, 2013, the student requested a smaller class size. (Petitioner's Exhibit 2; Student's Testimony)
53. The student's March 13, 2013 IEP prescribed ten hours per week of specialized instruction within the general education environment, 15 minutes per month of OT consultation services, assistive technology and accommodations and modifications. (Petitioner's Exhibit 1)
54. DCPS did not have a copy of the July 2011 Intensive Phonological Awareness and Reading Fluency Program Report from School B during the student's March 21, 2012 and March 13, 2013 IEP Team meetings. (Petitioner's Exhibit 8; Respondent's Exhibits 5 and 32; School Psychologist's Testimony; Assistant Principal's Testimony)
55. In May 2013, the student's handwriting was 50% legible. (Petitioner's Exhibits 13 and 17; Respondent's Exhibit 27)

56. During the second through fourth quarters of the 2012-2013 school year, the student did not consistently use assistive technology. (Petitioner's Exhibits 2, 13 and 17; Respondent's Exhibit 23, 26 and 27)
57. During the 2012-2013 school year, the student participated in a reading intervention program at School A. (Petitioner's Exhibits 7 and 8; Respondent's Exhibit 16; Parent's Testimony; Special Education Teacher's Testimony; Student's Testimony; Assistant Principal's Testimony)
58. During the 2012-2013 school year, the student's grades were greatly impacted by his failure to complete classroom assignments and homework. (Petitioner's Exhibits 10, 14 and 17; Parent's Testimony; Student's Testimony)
59. During the 2012-2013 school year, the student was absent for 15 days, accounting for 102 classes. (Petitioner's Exhibit 16; Parent's Testimony; Assistant Principal's Testimony)
60. During the 2012-2013 school year, at times the student used his computer in class to access extra-curricular activities (such as music) rather than the assigned task. (Petitioner's Exhibit 17; Parent's Testimony)
61. In September 2013, DCPS agreed to conduct speech-language and OT assessments of the student. (Respondent's Exhibit 28; Parent's Testimony; Assistant Principal's Testimony)

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

#### **Burden of Proof**

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

#### Issue #1

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 34 CFR §§300.304 through 300.311 if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child's parent or teacher requests a reevaluation. 34 CFR §300.303(a). A reevaluation conducted under paragraph (a) of this section may occur not more than once a year, unless the parent and the public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 CFR §300.303(b).

In the present case, the Petitioner alleged that DCPS failed to comprehensively evaluate the student in March 2012, specifically by failing to conduct speech-language and occupational therapy assessments/evaluations of the student.

Evaluation is defined as, "procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 CFR §300.15. In conducting an evaluation, an LEA must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability" and the content of the child's IEP. 34 CFR §300.304(b). IDEA regulations at 34 CFR §300.304(c)(4) require a student to be "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities."

In the present matter, the student was identified as a student with disabilities in the 1<sup>st</sup> grade. He received a reevaluation in November 2009. In March 2012, DCPS was not required to conduct a triennial reevaluation of the student as three years had not elapsed since the student's November 2009 reevaluation. However, even though three years had not elapsed since the student's prior evaluation, DCPS would have had to reevaluate the student if DCPS determined that the educational or related services needs, including improved academic achievement and functional performance, of the student warranted a reevaluation or if the child's parent or teacher requests a reevaluation. There is no evidence in the record that the student's parent requested a reevaluation of the student in March 2012.

Although the Petitioner argued that DCPS should have conducted speech-language and OT assessments of the student based on the recommendations in the July 2011 Intensive Phonological Awareness and Reading Fluency Program Report from School B, DCPS did not have a copy of this report in March 2012. There is no evidence in the record which suggests that any member of the student's IEP Team had a concern with the student's speech-language

functioning in March 2012. While the speech-language pathologist who provided services to the student during the Summer of 2011 had a concern regarding the speech-language functioning, there is no evidence that this concern was relayed to or shared by any member of the student's IEP Team.

The student's March 2012 IEP Team discussed the student's OT functioning. At that time, the OT had no concerns regarding the student's visual or motor functioning. During the student's March 21, 2012 IEP Team meeting, the student's IEP Team, including the student's parent, agreed to continue OT consultative services for the student. The parent noted her concern that the student may be becoming over-reliant on the calculator in math class and the team discussed the student's assistive technology needs as they related to the student's OT functioning. To address the student's OT needs at the time, the student's March 21, 2012, IEP Team recommended a complete assistive technology assessment.

Here, it is important to note the distinction between "evaluation" and specific assessment tools. The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." *Long v. District of Columbia*, 780 F. Supp. 2d 49, (D.D.C. March 23, 2011) (quoting 20 U.S.C. § 1414(b)(2)(A)). A district has the prerogative to choose assessment tools and strategies. *See Amanda Ford v. Long Beach Unif. Sch. Dist.*, 291 F.3d 1086 (2002) (parents did not provide any empirical grounds on which to base a challenge to the district's choice in assessment tools and strategies). The student's March 21, 2012 IEP Team had concerns regarding the student's OT functioning however chose to conduct an assistive technology assessment to address the student's difficulties. The IEP Team members agreed that the student continued to require OT consultative services, agreed upon the student's OT needs and agreed upon how to address those needs.

On September 17, 2012, DCPS conducted a data review of the student's academic and functional data. On September 19, 2012, the student's IEP Team met to reevaluate the student and determined that no additional assessments were needed to determine the student's eligibility. At that time, there continued to be no concerns regarding the student's speech-language functioning and the student's IEP Team continued to agree upon how to address the student's OT needs. Further, after receiving a copy of the July 2011 Intensive Phonological Awareness and Reading Fluency Program Report from School B in September 2013, DCPS agreed to conduct speech-language and OT assessments of the student.

The Hearing Officer concludes that DCPS did not fail to comprehensively evaluate the student in March 2012.

The Petitioner failed to meet its burden with respect to Issue #1.

#### Issue #2

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For

an IEP to be “reasonably calculated to enable the child to receive educational benefits,” it must be “likely to produce progress, not regression.” *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

The Petitioner alleged that DCPS denied the student a FAPE by failing to develop appropriate IEPs for the student on March 21, 2012 and March 13, 2013, specifically by failing to include ten (10) hours per week of specialized instruction outside of the general education environment rather than ten (10) hours per week of specialized instruction within the general education environment, direct occupational therapy, goals to address the student’s deficits in motor skills and speech-language services.

### *Specialized Instruction*

The student is diagnosed with ADHD, struggles with dysgraphia and is classified as a student with SLD and struggles with dysgraphia. The student is outgoing, gregarious, meets new people easily, is polite and friendly and has a pleasant sense of humor. The student has an average full-scale IQ, average abilities in visual tasks, “superlative” strength in verbal comprehension and an “exceptional” ability to think and problem-solve with analytical tasks that emphasize language. The student has low average abilities in working memory and processing speed, a tendency to rush and miss important visual details and a weakness in the automaticity of retrieval of already-learned material. The student struggles with math calculation however functions in the average range in math reasoning.

During the summer of 2011, the student attended a speech-language reading fluency program at School B. The speech-language reading fluency program was designed to help students with reading disabilities address underlying skills that make up the foundation of reading fluency. At the end of Summer 2011, the student was “ready to encounter” grade level reading material through blending, phoneme segmentation and phoneme manipulation however was not “ready to encounter” reading material through code knowledge. In November 2011, the student had not made progress toward his written expression IEP goal based on his difficulty with focusing however by January 2012, the student was able to research, outline and draft a paper that contained grouped ideas presented in a logical order. Also, while the student had weak spelling skills, the student was able to dictate his thoughts and produce a written product.

On March 21, 2012, the student’s IEP Team met to develop the student’s annual IEP. At that time, the student’s IEP Team noted that the student needed individualized instruction in order to access new material in math and although the student’s inattention and lack of focus hindered the student’s mastery of his IEP goals, the student was able to keep pace with his peers with the assistance of a calculator. In reading, the student was able to comprehend text at or above grade level when passages are read to him however struggled in decoding and word recognition. The student’s March 21, 2012 IEP prescribed ten hours per week of specialized instruction within the general education environment, 15 minutes per month of OT consultation services, assistive technology and accommodations and modifications.

Although the parent testified that at the beginning of the 2011-2012 school year the student had “Cs” then “tanked,” this testimony is not supported by the record. For the 2011-2012 school year, the student received the grade letter “C-“ in math and science, the grade letter “C+” in English, the grade letter “B” in Reading Workshop and music, the grade letter “D” in history and the grade letter “B+” in physical education. Further, for the 2011-2012 school year, the student scored in the Below Basic range in reading and composition, and in the Proficient range in math on the DC CAS.

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). The IDEA creates a strong preference in favor of “mainstreaming” or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999). Furthermore, children with disabilities are only to be removed from regular education classes “if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 CFR §300.114(a)(2). For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. *Id.*

The Hearing Officer concludes that the student’s March 21, 2012 IEP was reasonably calculated to enable a child to receive some educational benefit. Although the student had deficits in academic areas and with attention, the student’s IEP provided specialized instruction within the general education environment to support the student. The IDEA required that the student be educated in the least restrictive environment. The student had average abilities in academic areas and was able to function at grade level with accommodations, assistive technology and individualized attention. The student began the school year primarily “ready to encounter” grade level reading material. Throughout the school year, the student earned primarily average grades, progressed toward mastery of all of his IEP goals and was able to score at the Proficient level in math on state level testing. Therefore, DCPS did not deny the student a FAPE by failing to include ten hours per week of specialized instruction outside of the general education environment rather than ten hours per week of specialized instruction within the general education environment on the student’s March 21, 2012 IEP.

On September 17, 2012, DCPS conducted a data review of the student’s academic and functional data. At that time, the student’s teacher reported that it was difficulty obtaining work product from the student. During the 2012-2013 school year, the student lacked initiative in English, Reading Workshop, math and physical education. The student needed regular redirection and prompting to stay on task, required encouragement to begin written work and displayed a decreased ability to address his distraction and short attention span. For the second through fourth quarters of the 2012-2013 school year, the student did not consistently use assistive technology to complete academic assignments and the student’s grades were greatly impacted by his failure to complete classroom assignments and homework. In March 2013, the

student was earning the grade letter “F” in English, science, history and math; the grade letter “B-“ in Reading Workshop; the grade letter “D+” in physical education; and the grade letter “B+” in art.

On March 13, 2013, the student’s IEP Team met to develop the student’s annual IEP. The student’s IEP Team noted that the student had “digressed” in reading since the 7<sup>th</sup> grade. During the meeting, the student requested a smaller class size. The student’s March 13, 2013 IEP prescribed ten hours per week of specialized instruction within the general education environment, 15 minutes per month of OT consultation services, assistive technology and accommodations and modifications.

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. Here, the record is clear that during the 2012-2013 school year the student’s progress and academic functioning declined from the previous year, particularly the student’s performance in reading. While the Hearing Officer acknowledges that the student’s excessive absences during the 2012-2013 school year must have affected the student’s grades and progress toward mastery of his IEP goals, the student’s lack of motivation, declining grades and request to be in smaller class sizes nonetheless needed to be addressed by the student’s IEP Team. Likewise, the Special Education Teacher testified that the student needed either reading intervention or an out of general education setting for reading. The Special Education Teacher testified that an inclusion setting is appropriate for the student in math based on the student’s ability to access the general education curriculum and function at grade level with appropriate support.

The Hearing Officer concludes that DCPS denied the student a FAPE by failing to include specialized instruction outside of the general education environment for five hours per week in English Language Arts (ELA) and specialized instruction outside of the general education environment for two and one half hours per week in math on the student’s March 13, 2013 IEP. The student’s IEP Team acknowledged the student’s “digression” in reading and DCPS’ witness testified that the student needed specialized instruction outside of the general education environment in reading. Although the student continued to be able to access the general education curriculum in math, the student’s ADHD behaviors impeded the student’s adequate functioning in math. Therefore, the student required some the individualized instruction previously provided in the general education setting in math outside of the general education environment in order to address the student’s lack of attention and completion of classwork.

#### *Occupational Therapy Services/Appropriate OT Goals*

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student’s needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). A student’s IEP must be designed to meet the student’s unique needs and be reasonably calculated to provide the student with some educational benefit, but the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s abilities. (*Rowley, supra*, 458 U.S. 176 at p.

200.) For an IEP to be “reasonably calculated to enable the child to receive educational benefits,” it must be “likely to produce progress, not regression.” *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

Although the student is competent at hands-on activities such as putting cars together, building elaborate structures with Legos and making electronic equipment, the student struggles with dysgraphia as evidenced by his difficulty manipulating a pencil, “scratchy” handwriting which is often illegible and weak fine-motor coordination. It is uncontested that the student has functional deficits in motor and writing skills and has difficulty with motor planning and dexterity.

In March 2011, the student mastered the OT goals on his IEP. In February 2012, the OT had no concerns regarding the student’s visual or motor functioning. On March 21, 2012, the student’s IEP Team agreed to continue OT consultative services for the student and recommended a complete assistive technology assessment for the student. Through assistive technology devices, the student is able to dictate his thoughts and produce a written product and take notes in class. In May 2013, the student’s handwriting was 50% legible. During the second through fourth quarters of the 2012-2013 school year, the student did not consistently use assistive technology and, at times, used his computer in class to access extra-curricular activities (such as music) rather than the assigned task.

Related services are supportive services required to assist a child with a disability to benefit from special education. *See* 34 CFR §300.34(a). Occupational therapy includes improving, developing, or restoring functions impaired or lost through illness, injury or deprivation; improving ability to perform tasks for independent functioning if functions are impaired or lost; and preventing, through early intervention, initial or further impairment or loss of function. *See* 34 CFR §300.34(c)(6). Assistive technology means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. 34 CFR §300.5.

It is uncontested that the student has functional deficits in motor and writing skills and has difficulty with motor planning and dexterity. It is also uncontested that the student’s handwriting and dysgraphia limit the student ability to produce handwritten assignments. However, rather than addressing the student’s impaired functions through direct OT services, School A addressed this problem by providing the student with assistive technology devices. The student progressed toward mastery of his IEP goals using the assistive technology and was able to benefit from special education with the use of assistive technology. To the extent that the student was not producing passing grades, the record is clear that the student’s lack of focus and initiative and poor reading ability caused his failing grades. Although the student did not consistently and appropriately use his assistive technology devices the second through fourth quarters of the 2012-2013 school year, the student was able to regain focus and complete assignments when prompted and encouraged.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of*

*California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *affd*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. While the student has functional deficits in motor and writing skills and has difficulty with motor planning and dexterity, the student's IEP Team chose to address these needs through assistive technology rather than direct OT services. The record contains evidence that the student's IEP Team agreed that the assistive technology was effective and that the student did not require additional OT services or goals to address his deficits. The record does not contain evidence to support the contention that the student's needs should have been addressed through direct OT services rather than assistive technology. Direct OT services may have maximized the student's abilities however DCPS was required to develop an IEP reasonably calculated to enable the child to receive educational benefits, rather than maximize the student's abilities.

The Hearing Officer concludes that the Petitioner did not meet its burden in proving that the student's March 21, 2012 and March 13, 2013 IEPs should have included direct OT services and motor goals.

#### *Speech-Language Services*

The student's IEP needed to accurately reflect the results of evaluations to identify the student's needs and establish annual goals related to those needs. *See* 34 CFR 300.320(a).

As discussed in Issue 31, although the Petitioner argued that student should have received speech language services based on the recommendations in the July 2011 Intensive Phonological Awareness and Reading Fluency Program Report from School B, DCPS did not have a copy of this report in March 2012 or March 2013. Further, there is no evidence in the record which suggests that any member of the student's IEP Team had a concern with the student's speech-language functioning in March 2012 or March 2013 or that the student had a speech-language impairment which required the student to receive supportive services to assist him to benefit from special education. While the speech-language pathologist who provided services to the student during the Summer of 2011 had a concern regarding the speech-language functioning, there is no evidence that this concern was relayed to or shared by any member of the student's IEP Team in March 2012 or March 2013.

The Hearing Officer concludes that the Petitioner did not meet its burden in proving that the student's March 21, 2012 and March 13, 2013 IEPs should have included speech-language services.

The Petitioner met its burden with respect to Issue #2 related to specialized instruction outside of the general education environment.

### Requested Relief

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* “. . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003). In this case, the denial of FAPE is DCPS' failure to provide the student with five hours per week of specialized instruction outside of the general education environment in ELA and two and one half hours per week of specialized instruction outside of the general education environment from March 13, 2013 through present.

When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. See also *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

As relief, the Petitioner requested for the student to attend School B's Intensive Phonological Awareness and Reading Fluency Program for the summer of 2014, at DCPS expense, for DCPS to fund the initial assessment at the Lindamood-Bell reading program and 64 hours of services in the intensive reading program at the Lindamood-Bell for the student. The Petitioner's compensatory education does not address math.

The Hearing Officer has identified the period of the denial of FAPE from March 13, 2013 through present, approximately 24 weeks. Petitioner's request for compensatory education goes well beyond the identified denial of FAPE for DCPS' failure to provide the student with five hours per week of specialized instruction outside of the general education environment in ELA and two and one half hours per week of specialized instruction outside of the general education in math for the period of the denial. Both services requested by the Petitioner are intensive services which are likely to produce far greater benefit than specialized instruction in a school environment. An hour-for-hour award is not appropriate given the nature of the programs requested by Petitioner.

Based on these factors, it is equitable for the student to receive compensatory education in the form of School B's Intensive Phonological Awareness and Reading Fluency Program for the summer of 2014 to provide the educational benefits that likely would have accrued from

specialized instruction outside of the general education environment in reading from March 13, 2013 through present that the school district should have supplied and 30 minutes per week of one-on-one tutoring for the specialized instruction outside of the general education environment in math not supplied by DCPS.

**ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. DCPS shall fund the tuition for the student to attend School B's Intensive Phonological Awareness and Reading Fluency Program for the summer of 2014.
2. DCPS shall provide the student with 12 hours of independent one-on-one tutoring in math, at a rate not to exceed the Office of the State Superintendent's (OSSE's) established rate for this service, to be completed by March 14, 2014.
3. Within 10 school days of the date of this Order, DCPS shall revise the student's IEP to provide five hours per week of specialized instruction outside of the general education environment for ELA; two and one half hours per week of specialized instruction outside of the general education environment for math; and two and one half hours per week of specialized instruction within the general education environment for math.
4. All other relief sought by Petitioner herein is **denied**.

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: November 6, 2013

  
Hearing Officer